Supreme Court, U.S.
FILED
SEP 18 2001
CLERK

No. 01-116

IN THE

Supreme Court of the United States

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

JAMES M. SPEER, JR.
ATTORNEY AT LAW
300 E. Main Street
Suite 1440
El Paso, Texas
(915) 534-7393

LISA M. POWER
EL PASO COUNTY WATER
IMPROVEMENT DISTRICT NO. 1
294 Candelaria
El Paso, Texas 79907
(915) 859-4186

W. WENDELL HALL
Counsel of Record
FULBRIGHT & JAWORSKI L.L.P.
300 Convent Street
Suite 2200
San Antonio, Texas 78205
(210) 224-5575

Attorneys for Petitioner

169463

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Petitioner El Paso County Water Improvement District No. 1 ("the District") files this Reply to address new points raised in the Brief in Opposition of Respondent Southwestern Bell Telephone Company ("Southwestern Bell"). Southwestern Bell's brief contains significant errors and misrepresentations concerning the District's position.

I. Southwestern Bell's assertions in its Statement of the Case that the District has claimed immunity from federal and state law and that the District claims to be a private property owner are absurd and false.

Southwestern Bell's contention that the District claims to be immune from federal and state law is untrue and wholly unsupported by the record. The District has raised questions about the constitutionality and proper interpretation of Texas statutes upon which Southwestern Bell based its complaint in the district court. The District, as a governmental entity responsible to the State of Texas, the District's taxpayers, and the District's water users, is a creature of the laws of the State of Texas. The District understands that it, like every person, business entity, and governmental agency must comply with state and federal law.

Undeniably, under Article XVI, Section 59 of the Texas Constitution, the District is a governmental agency and, conversely, is not a "private property owner." By statute, TEXAS WATER CODE § 49.211(b), the District is authorized to purchase and own land. Tex. Water Code § 49.211(b) (Vernon 2000). While the District is a governmental agency that owns property for the benefit of the public, its rights-of-way for canals and drains generally are not open to public use. For obvious reasons, the public does not possess a right of free and unlimited access to District property, just as the public has no free access to state highway department storage and maintenance areas, state-owned prisons, and judges' chambers.

II. The Fifth Circuit's decision did not create a new conflict among the circuits but conflicts with its own previous decisions and illustrates the existing conflict among the circuits regarding the Eleventh Amendment immunity test, which conflict this Court should cure.

The District's Petition does not suggest that the Fifth Circuit's decision in this case creates a conflict among the circuits regarding the Eleventh Amendment immunity test because the conflict among the circuits has existed for some time. The Fifth Circuit's decision illustrates the conflict and departs from the usual and accepted course of judicial proceedings by ignoring *stare decisis*.

The District's Petition points out that the factors tests applied by the circuit courts of appeal vary significantly and range from two factors to nine. Justice O'Connor noted seven years ago that the circuit courts then were struggling to apply the Eleventh Amendment immunity test and that there was no uniformity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting). There is no truth to Southwestern Bell's assertion that the Fifth Circuit's decision in this matter is in accord with the decisions of all other circuits. There is no accord among the circuits. Southwestern Bell's Brief in Opposition, at note 2, recites a list of cases demonstrating this very point.

The Fifth Circuit has permitted one panel to overrule a decision of an earlier panel directly on point, completely ignoring *stare decisis*, and leaving in total disarray the issue of Eleventh Amendment immunity status for all districts created under Article 16, Section 59 of the Texas Constitution.

III. The District does not urge a single-factor test.

The District has never urged adoption of a single-factor test for Eleventh Amendment immunity; rather, the District submits that there is a threshold question to be answered, and the answer may obviate any need to apply a multi-factors test.

The threshold question essentially is: What is the state's intention as to the entity's arm-of-the-state status? In this case, Article XVI, Section 59 of the Texas Constitution answers that the State of Texas intended that districts created under this Article be considered arms of the state. In other words, the District interprets this Court's language in *Regents of University of California v. Doe*, 519 U.S. 425, 430 (1997), to mean that when state law clearly establishes a governmental agency as an arm of the state, then there is simply no need to apply a multi-factor test. *See* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1309 (1992). The District agrees with Rogers' conclusion that only if the state's intention is unclear should the inquiry proceed.

IV. Only the law of Texas can supply the answer to whether the District is an arm of the State.

Southwestern Bell's citation to authorities outside the Fifth Circuit for the proposition that the District is not an arm of the State of Texas is irrelevant. ***One must look to the law of Texas*** to determine whether the District is an arm of the State of Texas for purposes of Eleventh Amendment immunity. Although the question whether a state agency is an arm of the state is a federal question, "that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents*, 519 U.S. 425, 430 n.5.

For example, in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court analyzed the question of whether an Ohio board of education, as a political subdivision of the State of Ohio, was entitled to Eleventh Amendment immunity by looking specifically to the law defining local school districts. "*Under Ohio law* the 'State' does not include 'political subdivisions' and 'political subdivisions' do not include school districts." *Mt. Healthy*, 429 U.S. at 280 (emphasis added). Consequently, Southwestern Bell's citations to First

Circuit and Seventh Circuit decisions relying on other law (not Texas law) for authority that the District is not an arm of the State of Texas are meaningless.

Southwestern Bell's citation to Texas appellate decisions that compare water districts to counties also is irrelevant to the issue before this Court. *See Sears v. Colorado River Mun. Water Dist.*, 487 S.W.2d 810 (Tex. Civ. App.–Eastland 1972, writ ref'd n.r.e.) (whether a water district is immune from tort liability and is more like a county performing governmental functions than a municipality performing proprietary functions); *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937 (Tex. 1993) (whether a municipal utility district is a "political subdivision" for purposes of executing mineral leases pursuant to Chapter 16 of the Water Code). Southwestern Bell selectively lifts language from these cases without reference to the context or issue and misuses authorities to support its proposition.

What is relevant to the issue before this Court, however, is that the Supreme Court of Texas and the Fifth Circuit have indicated that political subdivisions of Texas created under Article XVI, Section 59 of the Texas Constitution are arms of the state of Texas entitled to Eleventh Amendment immunity. *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103 (5th Cir. 1995); *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 815 (Tex. 1993).

V. Texas Water Code Chapter 51 does not apply to any issue in this case.

The sections of Texas Water Code Chapter 51 cited by Southwestern Bell have nothing to do with the District. "Water improvement districts are governed by Chapter 55 of the [Texas] Water Code. . . . The purposes for which they may be formed are more narrow than municipal utility districts or water control and improvement districts." 36 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 46.79 (Matthew Bender & Co. ed., 1989); TEX. WATER CODE §§ 55.001 – 55.755

(Vernon Supp. 2001). Water control and improvement districts are governed by Chapter 51 of the Texas Water Code. DAVID B. BROOKS § 46.37; TEX. WATER CODE § 51.001 (Vernon Supp. 2001). Southwestern Bell erroneously cites Chapter 51 as applying to the District, which is a water improvement district. Southwestern Bell is simply wrong.

VI. The District does not rely solely on an unpublished district court decision and dicta.

Contrary to Southwestern Bell's mistaken insistence, the District relies on published opinions, *Ysleta Del Sur Pueblo v. El Paso County Water Improvement District No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000) and *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103 (5th Cir. 1995), among others, for claiming Eleventh Amendment immunity. These cases hold that districts created under Article XVI, Section 59 of the Texas Constitution are arms of the State of Texas and immune from suit in federal court. In *Ysleta*, the Fifth Circuit held specifically that the District is entitled to Eleventh Amendment immunity from suit in federal court.

CONCLUSION

This action presents this Court with the perfect opportunity to cure the conflict among the circuits over the tests used to analyze the nature of a governmental agency to determine whether it is entitled to Eleventh Amendment immunity. The Fifth Circuit's panel opinion on March 19, 2001, reversing its prior panel opinion on April 10, 2000 in *Ysleta*, which confirmed that the District was entitled to Eleventh Amendment immunity, highlights the confused state of affairs that exists among the circuit courts — and the Fifth Circuit — in their application of the test for Eleventh Amendment immunity. The District respectfully renews its Petition for Certiorari and prays that the Court will grant the Petition.

Respectfully submitted,

W. WENDELL HALL
Counsel of Record
FULBRIGHT & JAWORSKI L.L.P.
300 Convent Street
Suite 2200
San Antonio, Texas 78205
(210) 224-5575

JAMES M. SPEER, JR.
ATTORNEY AT LAW
300 E. Main Street
Suite 1440
El Paso, Texas
(915) 534-7393

LISA M. POWER
EL PASO COUNTY WATER
IMPROVEMENT DISTRICT NO. 1
294 Candelaria
El Paso, Texas 79907
(915) 859-4186

Attorneys for Petitioner